

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHRISTOPHER THOMPSON, JR.,

Defendant-Appellant.

UNPUBLISHED

December 18, 2003

No. 240972

Kalamazoo Circuit Court

LC No. 01-001112-FC

Before: Talbot, P.J., and Owens and Hood, JJ.

PER CURIAM.

Defendant's convictions arise from a physical altercation between defendant's friend, Antoine Pitts, and Jamar McCall during which defendant shot and injured McCall, and shot at McCall's two sisters and sixteen-year old brother, Roy Thomas. Defendant was charged with four counts of assault with intent to commit murder, MCL 750.83, and four counts of possession of a firearm during the commission of a felony, MCL 750.227b. Following a jury trial, defendant was convicted of the lesser included offenses of one count of assault with intent to commit great bodily harm less than murder, MCL 750.84, for shooting and injuring McCall, and three counts of felonious assault with a gun, MCL 750.82(1), for shooting at McCall's three siblings. Defendant was also convicted of four counts of felony firearm, MCL 750.227b. Defendant was sentenced as a second habitual offender to a term of five to fifteen years' imprisonment for the assault with intent to do great bodily harm conviction to be served concurrently with terms of two to six years' imprisonment for each of the three felonious assault convictions. Concurrent terms of two years' imprisonment for the convictions of the four counts of felony firearm are to be served consecutively to the above convictions. Defendant appeals as of right. We affirm.

On appeal, defendant argues that he was denied the effective assistance of counsel for his counsel's failure to call a hostile witness and his counsel's failure to request an evidentiary hearing to determine whether a letter from a jail inmate, dated five days before defendant's sentencing, constituted newly-discovered evidence requiring a new trial. Specifically, defendant

requests this Court to remand the matter to the trial court for a *Ginther*¹ hearing to afford him the opportunity to establish a factual record. We disagree.

To support a claim of ineffective assistance of counsel, a defendant must establish that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the trial would have been different. *Id.* Because defendant failed to preserve this issue for appeal, our review is limited to mistakes apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

With respect to defendant's claim that his counsel failed to call a hostile witness, the record indicates that defendant's counsel attempted to add a new witness at the conclusion of the trial. The trial court conducted an evidentiary hearing out of the presence of the jury to question the witness, Otha Potts, who testified that he was defendant's uncle and also the father of Antoine Potts who was involved in the altercation that gave rise to defendant's convictions. Otha Potts provided hearsay testimony indicating that his wife, Ursula Potts, told him that a third person, Mike Whitfield, told her that he, Whitfield, shot McCall, not defendant. The court determined that Ursula Potts had been identified as a potential witness and took the matter under advisement until the next morning. However, the next morning, defendant's counsel expressly stated on the record that he was not pursuing the matter any further because he spoke with Ursula Potts. Defendant's counsel's explanation on the record is as follows:

DEFENDANT'S COUNSEL: As to Ursula Potts, I attempted to contact her more than once last night; did finally talk to her earlier this morning. An individual who I believe was Ms. Potts -- as she represented herself to be such -- indicated that she did not want to be involved, has nothing else to say. She felt that the defendant did not do the crime, but she can't help; so I do not intend to put on a witness who does not want to be here and does not intend to be cooperative and, in essence, seems to say she has no real evidence.

On appeal, defendant does not address the presumption that his counsel's decision not to call Ursula as a hostile witness was a decision grounded in sound trial strategy. Nor does defendant explain how Ursula's testimony would have made a difference in the outcome of his trial had she been compelled to testify as a hostile witness or even what her testimony may have been. Rather, defendant merely argues that his counsel should have called Ursula before the trial court for an evidentiary hearing to discover the content of Ursula's testimony. Accordingly, defendant fails to provide this Court with anything to justify a remand for a *Ginther* hearing.

With respect to the alleged newly-discovered evidence, defendant argues that his counsel was ineffective for failing to request an evidentiary hearing. Defendant attaches to his brief on

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

appeal a letter allegedly authored by a jail inmate, a stranger to defendant and Mike Whitfield, who stated that Whitfield told him that Whitfield, not defendant, shot McCall and that defendant was serving time for the crime. The letter was addressed to defendant's counsel and dated five days before defendant's sentence in this case. At sentencing, defendant's counsel informed the trial court that he received information that Whitfield told a prisoner that he committed the shooting in this case. Defendant's counsel did not ask for an evidentiary hearing but proceeded to protest defendant's innocence and requested the court to sentence defendant at the low range of the sentencing guidelines.

A motion for a new trial on the basis of newly discovered evidence must first be brought in the trial court in accordance with the Michigan Court Rules. MCR 2.611 and 2.612; *People v Darden*, 230 Mich App 597, 605-606; 585 NW2d 27 (1998). A trial court may grant a defendant's motion for a new trial "on any ground that would support appellate reversal of the conviction or because it believes that the verdict has resulted in a miscarriage of justice." MCR 6.431(B). A motion for a new trial based on newly discovered evidence may be granted upon a showing that (1) the evidence itself, not merely its materiality, is newly discovered, (2) the evidence is not merely cumulative, (3) the evidence is such as to render a different result probable on retrial, and (4) the defendant could not with reasonable diligence have produced it at trial. *People v Lester*, 232 Mich App 262, 271; 591 NW2d 267 (1998).

On appeal, defendant does not assert that the letter was newly discovered evidence. Rather, he asserts that his several attempts to contact the author of the letter were unsuccessful and he requests this Court to remand the matter for a *Ginther* hearing to determine whether the letter constituted newly discovered evidence. Even assuming that the evidence was newly discovered and that defendant could not produce it at trial, defendant does not explain how his trial counsel was ineffective for failing to request an evidentiary hearing. Defendant fails to demonstrate on appeal how the testimony of the letter's author would make a difference in the outcome of a new trial. Rather, the evidence of the letter and its author's testimony would have been cumulative to defendant's own testimony at trial that it was Whitfield who was the gunman and to the testimony of Antoine Potts who stated that defendant was not the gunman in this case. Accordingly, we conclude that defendant failed to overcome the presumption that his counsel's decision not to pursue the matter was sound trial strategy and that defendant failed to establish ineffective assistance of counsel.

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Karen M. Fort Hood